IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1942

No. 324

RICHARD SMITH,
Petitioner,

v.

R. H. LAWRENCE,
Warden, Georgia State Prison,
Respondent.

BRIEF OF R. H. LAWRENCE, WARDEN, GEORGIA STATE PRISON, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN A. BOYKIN,
Solicitor General,
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Assistant Solicitor General,
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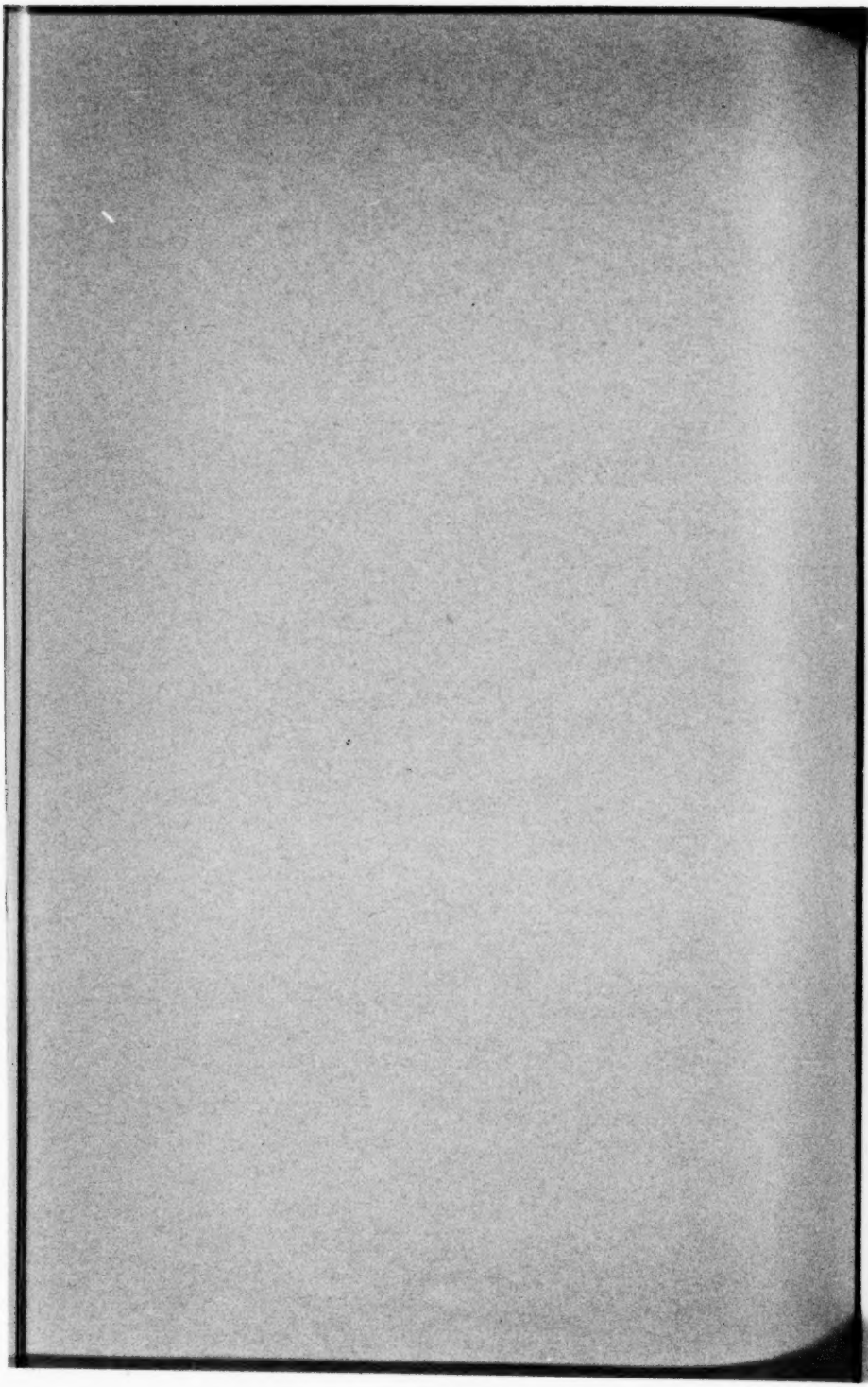

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SUBJECT INDEX

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PART ONE

STATEMENT OF FACTS

The petitioner, twenty-two years old in July, 1941, according to his testimony (R. 202), was indicted and convicted in the Superior Court of Fulton County, Georgia (R. 22-23) for the murder of T. H. Herd, a nightwatchman, during a liquor store burglary, which occurred on October 16, 1938. After petitioner's conviction, he was sentenced to death on December 13, 1938.

At the trial of petitioner, Raymond Carter, jointly indicted with him, testified that he and petitioner were engaged in the burglary of a liquor store, that he was watching for petitioner, that the nightwatchman came up and petitioner hit the watchman over the head with a milk bottle filled with sand (R. 74-75). Carter further testified that he, Carter, was already under sentence of death for killing a policeman at Jackson, Georgia. (R. 76-77).

Confession of petitioner was also introduced (R. 152) in which confession petitioner said that he broke into the liquor store, and after looking into the cash register and finding it empty, took three pints of liquor from the store, and came out. Petitioner further stated in his confession that after he came out of the liquor store the nightwatchman came up, told him to stop and pointed a pistol at him.

Then Raymond Carter, who was watching for petitioner, according to this confession, came out of an alley and hit the watchman in the head with a milk bottle filled with sand.

Motion for new trial was overruled on April 29, 1939 by Honorable Paul S. Etheridge, Judge, Superior Court (R. 32) and upon appeal to the Supreme Court of Georgia the sentence of the lower court was affirmed. **Smith v. State,** 189 Ga. 169. Subsequently petition for writ of habeas corpus was filed in the City Court of Reidsville, Georgia, upon substantially the same grounds now under review in the present proceeding. Said petitioner alleging that he was being deprived of his life without due process of law as the confession introduced at his trial was not voluntary and was coerced. (R. 46-55).

The writ was denied on May 13, 1940, by Honorable M. W. Eason, Judge of said court, (R. 191-192) by judgment, which was on appeal to the Supreme Court of Georgia affirmed. **Smith v. Henderson, Warden,** 190 Ga. 886.

Petition for rehearing was denied and thereupon petitioner applied to the United States Supreme Court for a writ of certiorari, which was denied March 10, 1941. **Smith v. Henderson, Warden,** 312 U. S. 698.

Petitioner, then on May 20, 1941, filed a petition

for writ of habeas corpus in the District Court of the United States for the Southern District of Georgia. (R. 2-16). This petition being almost a duplicate of the one, set forth above, filed to the City Court of Reidsville, Georgia.

Answer of respondent, R. H. Lawrence, Warden, (R. 16-196) was filed denying allegations of petition and pleading that the matters alleged in petition had already been adjudicated against petitioner by a court of competent jurisdiction, the City Court of Reidsville, Georgia, and attaching as exhibits to said answer a complete exemplification of all proceedings from said court. (R. 33-196).

A hearing was had in Savannah, Georgia on said habeas corpus, on July 18-19, 1941, before Honorable E. Marvin Underwood, United States Judge Designate for Southern District of Georgia, at which time testimony was taken in behalf of petitioner and respondent (R. 202-283) and petitioner testified at length in his own behalf (R. 202-231), claiming officers hollered in his ear, threatened to have him beaten and that he saw an officer strike another prisoner.

At this hearing respondent placed upon the witness stand all the officers, who questioned petitioner and who were named by him as inquisitors, except Johnson, who was dead. They testified (R. 241-274) that the confession was voluntary and that

no violence was used, nor threats, nor promises of any kind made, and that the questioning was not frequent, nor of long duration. That they would ask petitioner where he was and who he was with at the time of the murder of Mr. Herd, then go out and investigate the truth or falsity of petitioner's statement, and upon finding it to be false would confront petitioner with the results of their investigation; after being confronted two or three times with the results of the officers' investigation of his statements to them, petitioner said he would tell the truth about it and confessed to the crime with which he was charged. (R. 254-255).

At the conclusion of the habeas corpus hearing the court reserved its decision and on July 30, 1941 passed an order discharging the writ of habeas corpus and remanding petitioner to custody of respondent. (R. 302-305). An appeal was taken to the U. S. Circuit Court of Appeals for the Fifth Circuit and on June 16, 1942 the denial of the writ was affirmed. Motion for rehearing was denied on July 20, 1942.

PART TWO

ARGUMENT

Petitioner's claim of coercion, threats

and duress stands upon his uncorroborated testimony.

The outstanding question presented in this case is: was the confession of petitioner obtained by coercion, threats and duress? To substantiate this charge we have the uncorroborated testimony of the petitioner alone, a man we say of bad character, by reason of his previous conviction of burglary and six year sentence in 1935 for the same (R. 226) and, who, at the date the crime was committed, was on parole from such sentence, (R. 204) and who was engaging in shady transactions, such as aiding his accomplice, Raymond Carter, jointly indicted with him for murder of Mr. Herd, in the sale of certain cigarettes which he well knew, or had reason to know, were stolen. (R. 229-231).

All testimony of petitioner was refuted by the officers that he named in said testimony as having abused him, cursed him, shouted at him and threatened him, except Officer M. B. Johnson, who according to testimony adduced in this case, has been dead for a year or two. (R. 242).

We deny the generalities set forth in the statement in the petition for certiorari concerning the circumstances surrounding the confession of Richard Smith. We deny that petitioner was held incommunicado and denied the privilege of seeing or communicating with counsel, family and friends

from Sunday night until the following Tuesday, about noon, as he alleges. The Record shows there were five officers involved in this case, Superintendent McKibben, of Detectives, who was only called in to hear statement of petitioner, Ben Lyons, who only typed the statement, Captain Seabrook, head of the Fingerprint Department, who fingerprinted and photographed petitioner and assisted in questioning him, and Detectives D. L. Taylor and M. B. Johnson, the last named now dead, who were assigned to the case and who took the lead in investigating it. Mr. Taylor, the only living officer in position to know all the facts, testified (R. 265) that he did not keep petitioner from getting a lawyer until he had confessed, nor did he tell, nor hear anyone tell petitioner he could not see his family until he had confessed.

It is true that sister of petitioner testified (R. 237) "They told me I could not see him." It can be readily seen that there was no way to rebut this testimony as the word "they" could have meant any one of the five hundred or more officers of the Atlanta Police Department and it would have been manifestly impossible to close the Department, while the hearing at Savannah on petition for habeas corpus was taking place, and bring all of the officers of the Atlanta Police Department some three hundred miles to Savannah and put them on the witness stand one by one. This is the only way that the re-

spondent could have contradicted or denied this testimony.

Examination of record shows that the questioning of petitioner was conducted in a fair and orderly manner.

An examination of the record in this case shows (R. 183-189), (R. 202-274) that Richard Smith was arrested about 11:30 P. M. on a Sunday night, November 13, 1938, and was locked up that night without questioning; that the next day about 9 A. M. he was questioned, and during that day was questioned off and on, not continuously, by several detectives of the City of Atlanta, who would stop and go out and investigate things which Richard Smith said to them, and would later question him some more about the results of their investigation; that Richard Smith denied his guilt on that first day of questioning, making a number of statements to the detectives which they investigated and found to be false; that the questioning did not continue into the night; that on the morning of the second day on which questioning took place (Tuesday, November 15, 1938) Richard Smith confessed about 10 or 10:30 A. M.; that he did so freely and voluntarily; that Richard Smith found that his accomplice, Raymond Carter, had confessed, and also found that the police had discovered by investigations that his previous statements to them, concerning his movements and his whereabouts at the time of the homicide, were false; that

he confessed because he decided to unburden his mind of the truth; that this confession, first made orally to Captain Seabrook, of the Police Department, was then reduced to writing by a typist who was called into the room; that Richard Smith told the typist the things to put into the written statement, being asked questions during the typing, but only Richard Smith's statements being put down; that the confession was not made under any circumstances calculated to incite terror in the prisoner (cf. **Chambers v. Florida,** 309 U. S. 227) and not when his mind was worn out by any long and sustained questioning, but only after a reasonable questioning in which the prisoner voluntarily participated.

We respectfully submit that if the precedent is set by the Federal Courts of releasing all persons convicted of crime in the state courts, upon such persons uncorroborated claim that the confessions used against them in their trials were coerced, all such persons would claim it and the judgments of the state courts in criminal cases would soon become mere nullities.

It must be also remembered that the evidence of the State against petitioner, in which case petitioner was convicted, did not depend upon petitioner's uncorroborated confession alone, but also rested upon the testimony of Raymond Carter, the accomplice. (R. 71-82).

Notwithstanding petitioner's claims of threats and duress, he continued to claim that not he, but his accomplice, struck the blow killing the watchman, which was at variance with accomplice's sworn testimony.

The witness, Carter, and petitioner were in agreement as to the breaking of the liquor store and killing of the watchman, and that it was a joint enterprise; the only difference between the two was that each claimed the other struck the fatal blow.

We submit that here is another weakness in this claim of coercion by petitioner, that while he says he was telling the officers anything they wanted him to, on account of fear of being beaten, yet he never did confess to striking the blow that killed Mr. Herd, but on the other hand insisted that the blow was struck by Raymond Carter, who was watching for him, (R. 152) notwithstanding the fact that he had been confronted with Raymond Carter and Raymond Carter had told petitioner to his face that he was the one who struck down Mr. Herd. (R. 83). Why, if petitioner was willing to agree to anything and say anything that the police officers wanted him to, was he able to hold out on this particular point which was material to the case? We say that this is strong evidence against petitioner: that he was not coerced in any way at the time he

signed the confession.

Petitioner was not represented at his trial by appointed counsel, but by competent and able counsel of his own choosing, who did not object to introduction of his confession.

Also, why when petitioner was represented at his trial in the state court by competent and able attorneys, who were employed by him and not appointed by the Court (R. 304-305), was not objection made to the introduction of the confession (R. 91), (R. 98) on the grounds that it was involuntary and coerced?

Respondent contends that this is strong evidence that no force nor coercion was used and that petitioner's present claim of coercion is but an afterthought.

There is all the difference in the world between the facts in this case, as shown by the record, and facts in cases cited by petitioner.

Petitioner relies strongly on the cases of **Chambers v. Florida,** 309 U. S. 227; **White v. Texas,** 310 U. S. 530; **Ward v. Texas,** 86 L. ed (No. 15 Advanced Sheets) 1101; and **Brown v. Mississippi,** 297 U. S. 278. We say that there is all the difference

in the world between these above cited cases and the case at bar. No such case has been made out by petitioner as was made out by the records in the above stated cases.

No continuous questioning was shown. No night questioning was shown. No questioning over a period of many days was shown.

There were no circumstances of surrounding "terror" shown, as in the Chambers case.

The crime was not freshly committed and there was no aroused populace to mutter angry implications of threats. (cf. page 230 of Chambers decision). . .

There was no drag-net arrest of thirty to forty negro suspects by the police in an effort to show the aroused populace that arrests were being made for the crime. (cf. page 230 of Chambers decision).

There was no late night vigil, no 2:30 A. M. questioning, no confession "just before sunrise" as in the Chambers case. . .

The following seems to be the gist of the Chambers case which caused it to be reversed: (this being quoted from page 239 of the Chambers decision:)

> "For five days petitioners were subjected to interrogations culminating in Sat-

urday's all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. The rejection of petitioner Woodward's first 'confession', given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which 'broke' petitioner's will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirements of due process of law a meaningless symbol.''

We have incorporated the above from the Chambers decision in order that it might be clearly seen how far short of this was the case made out by petitioner.

In the case of **White** v. **Texas,** supra., the

facts in said case, as set out in the opinion of this court on pages 532 and 533, show that many times the prisoner was removed from jail and driven out on the road and then off the road by Texas Rangers, which was admitted by the State, and at which times the prisoner claimed he was whipped, which the State denied, and that the night of the alleged confession the Rangers went in and out of the eighth floor of the jail, with the elevator locked, where petitioner was interrogated from approximately 11:30 P. M. to 3 or 3:30 A. M., the original confession being reduced to writing after 2 A. M.

In **Ward v. Texas,** supra., the prisoner was moved from town to town, by day and night, and told of threats of mob violence and continuously questioned. In addition to the above, the prisoner claimed he was whipped and burned and there was other testimony to substantiate the latter claim.

The recital of facts, as set out in the opinion of this Court in **Brown v. Mississippi,** supra., is from beginning to end a story of extreme cruelty towards the prisoner and of "man's inhumanity to man." According to the record in this case, on pages 281-282, several negroes were arrested for murder. A rope was put around the neck of one of the defendants, then he was hung to the limb of a tree, then let down, tied to the tree and whipped.

Two other defendants, including Brown, the

petitioner in this case, after being incarcerated in jail, were made to strip, laid over chairs and their backs cut to pieces with a leather strap with buckles on it. These defendants were further given to understand that the whipping would continue until they confessed.

In **Pierce v. United States**, 160 U. S. 355 (3), the United States Supreme Court held, in an appeal from a death penalty conviction of murder, in an Arkansas court:

> "Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not extorted by inducements or threats." (Citing **Hopt v. Utah**, 110 U. S., 574, 583; **Sparf v. U. S.**, 156 U. S. 51, 55.)

Sparf v. U. S. 156 U. S., 51 held:

> "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises; telling the prisoner to tell the truth, is not offering to him an inducement to make a confession."

Three issues before this Court:

(A) Was the confession obtained by

duress?

(B) Have not the issues involved herein already been adjudicated?

(C) Is this not an attempt to have the writ of habeas corpus perform the functions of a writ of error?

Respondent respectfully submits that there are three issues before the court in this case:

(1) Whether or not the confession of Richard Smith was obtained through threats and duress?

(2) Have not the issues set up in the petition in the present case already been decided against petitioner by judgments of the City Court of Reidsville, the Supreme Court of the State of Georgia, and the Supreme Court of the United States?

(3) Should not petitioner have taken a direct appeal to the Supreme Court of the United States from the ruling of the Supreme Court of Georgia denying him a new trial, instead of attacking the judgment collaterally by habeas corpus proceeding? Respondent contends that petitioner is attempting to have the writ of habeas corpus perform the functions of a writ of error?

As to the first issue herein involved, petitioner's claim of duress and threats in obtaining his confess-

ion, we say that the burden of proof was upon him to so show, and that he has not carried the same, in accordance with the ruling of this Court in **Walker v. Johnson, Warden,** 312 U. S. 275 (5):

> "On a hearing in habeas corpus, the prisoner is under the burden of proving by a preponderance of evidence the facts which, he alleges, entitle him to a discharge."

Would not the fact that the same issues were raised and adjudicated against petitioner in a previous habeas corpus be of itself sufficient for the Court to refuse him the relief he seeks?

As to the second issue, if it be conceded that this court is not bound by the adjudication in the City Court of Reidsville of the same issues raised in the present petition, we say that the decision of the City Court of Reidsville, which was affirmed by the Supreme Court of the State of Georgia and certiorari denied by the Supreme Court of the United States, should not be lightly cast aside, but should be given careful consideration and due weight and that the showing that petitioner's contentions had already been adjudicated against him, as above set out, would in itself be enough for the court to refuse him the relief that he seeks.

In **Salinger v. Loisel**, 265 U. S. 230, in the opin-

ion of the Court, it was held:

> "But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed, just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed."

Then in the same decision, on page 232, it was held:

> "Here the prior refusal to discharge was by a court of coordinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the latter applications, on that ground, its discretion would have been well exercised and we should sustain its action without saying more."

There was an extensive discussion of this same

subject in a habeas corpus case which went up to the Supreme Court of the United States on appeal from the United States District Court for the Northern District of Georgia, that of **Frank v. Manghum,** Sheriff of Fulton County, Georgia, 237 U. S., 309. In the syllabus of said decision, on page 310, the Court held as follows:

> "Although petitioner's allegation that mob domination existed in the trial court might, standing alone and if taken as true, show a condition inconsistent with due process of law, if the record in the habeas corpus proceedings in the Federal Court also shows that the same allegations had been considered by the state court and upon evidence there taken but not disclosed in the Federal Court, had been found to be groundless, that finding cannot be regarded as a nullity but must be taken as setting forth the truth until reasonable ground is shown for a contrary conclusion."

We also wish to call attention to excerpts of the opinion of the court set out as follows:

Page 329:

> "It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the

state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in **Ex Parte Royall,** 117 U. S. 241, 252- Applying in a habeas corpus what was said in **Covell v. Heyman,** 111 U. S. 176, 182 a case of jurisdiction: "the forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." And see in re **Tyler, Pe-**

titioner, 149 U. S. 164, 186."

Page 333.

"Whatever question is raised about the jurisdiction of the trial court no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties **Southern Pacific Railroad v. United States,** 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see Ex parte **Terry,** 128 U. S. 289, 305, 310; Ex parte

Columbia George, 144 Fed. Rep. 985, 986."

Page 344:

"4. To conclude: Taking appellant's petition as a whole, and not regarding any particular portion of it to the exclusion of the rest—dealing with its true and substantial meaning and not merely with its superficial import—it shows that Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the State; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that state, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court-room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding;

his contention that his lawful rights were infringed because he was not permitted to be present when the jury rendered its verdict, has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts. In all of these proceedings the State, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to the established modes of procedure, and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty. In our opinion, he is not shown to have been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under "due process of law" within the meaning of the Constitution."

According to the decisions of the Supreme Court of the State of Georgia a second habeas corpus brought in the state courts between the same parties, with substantially the same questions as the first one, would be subject to plea of res adjudicata. In connection with the above, we wish to cite the

case of **Perry et al v. McLendon,** Sheriff, 62 Ga. Reports, 598 (1):

> "HABEAS CORPUS—JUDGMENT — RES ADJUDICATA. — Judgment on habeas corpus being in this state subject to review, especially where the imprisonment is on civil process, is final until reversed; and where the legality of the same cause of imprisonment is twice drawn in question between the same parties by successive writs of habeas corpus before the same court, or before different courts of competent original jurisdiction, the judgment on the former writ may be answered in bar of a discharge under the latter. The matter will be deemed res adjudicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were actually presented or not. It is sufficient if they might have been and ought to have been presented in the exercise of due diligence."

And also an excerpt from the opinion of this court in this case, beginning on page 603:

> "It would seem from the authorities, or some of them, (see Heard on Habeas Corpus) that where there is no such power of

review, there may be one writ of habeas corpus after another ad infinitum. But if there can be a review, is there any reason, especially in civil cases, in which the struggle is between party and party, and not with the king or commonwealth on one side, and the subject or citizen on the other, why the first adjudication, if acquiesced in, should not be final and conclusive? We can think of none. Such is the general rule of law, in other cases, and why cases of habeas corpus should not be included in its application, we cannot perceive or divine. Should the legality of an imprisonment in a civil case forever be and remain an open question, so long as the restraint continues? Is there no way to close it, and ought there to be none? Is liberty so precious? There is no such indulgence to anything else, not even to life itself. A single judgment will serve to hang a man, if left to stand unreversed. He cannot have trial after trial to ascertain if he is guilty, and determine whether he is to be executed. One complete trial, fair and legal, will carry him out of the world; and why should it not suffice to keep him in jail until some new right to a deliverance has arisen? Is the same alleged right to be investigated over and over, each time afresh, just as if no prior investigation had taken place? Is the grievance, real or supposed, of a prisoner the stone of

Sisyphus which courts can never bring to a place of rest? and if called to lift it up the same hill as often as it rolls down, must they comply? Doubtless there is an obligation to issue the writ of habeas corpus whenever, and as often as, it may be applied for, provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal. Code 4012. But when it appears, on the return or at the hearing, that the legality of the imprisonment has already been adjudicated upon a previous writ between the same parties, by a competent tribunal, the production of that judgment is the end of controversy. Further writs may be applied for and issued, but to each and all of them the one valid and subsisting judgment will be a conclusive answer, as to any and all objections to the legality of the restraint which were embraced in the first petition, or which could and should have been embraced in it. The effect of a judgment cannot be avoided by a difference in the pleadings, when those in the pleadings, when those in the first case could and should have been as full as those in the second, though in fact they were not. No party, plaintiff, or defendant, is permitted to stand his case before the court on some of

its legs, and if it falls, set it up again on the rest in a subsequent proceeding, and thus evade the bar of the former judgment. It is the body of a case and not certain of its limbs only, that the final judgment takes hold upon. Whoever brings the legality of an imprisonment into question by writ of habeas corpus, should, in the first instance, show as much cause for his attack as he can. He must discharge all his weapons, and not reserve a part of them for use in a future reencounter. He must realize that one defeat will not only determine the campaign, but end the war."

Should not petitioner have taken a direct appeal from the State Courts to the United States Supreme Court instead of attacking the judgment of the State Courts collaterally by writ of habeas corpus?

As to the third issue which we say is herein involved, that petitioner should not have attacked the judgment of the courts of Georgia collaterally, but should have taken a direct appeal from the State Courts to the Supreme Court of the United States, we note that in the cases cited by petitioner of **Chambers v. Florida,** 309 U. S. 221; **Ward v. Texas,** 86 L. ed (no. 15 Advanced Sheets) 1101; **Brown v. Mississippi,** 297 U. S. 278; **White v. Texas,** 310

U. S. 530, direct appeals were taken from the court of last resort in the state to the Supreme Court of the United States, and the judgments of the court of last resort, in the states referred to, were not attacked collaterally by a writ of habeas corpus.

In our search of United States Supreme Court decisions we have noted the reluctance with which they set aside the judgments of the state courts.

In **Rogers v. Peck,** 199 U. S. 425, on page 434 in the opinion of the court Mr. Justice Day said as follows:

> "The reluctance with which this court will interfere with a state in the administration of its domestic law for prosecution of criminals has been frequently stated in the deliverances of the court upon the subject. It is only when fundamental rights especially secured by the Federal Constitution are invaded that such interference is warranted."

In this case petitioner brought habeas corpus on the grounds that her death sentence for murder had not been put in proper form by the courts of Vermont, or the Governor.

In **Felts v. Murphy, Warden,** 201 U. S. 123 the United States Supreme Court held, in an appeal from

a death penalty conviction of murder, in an Illinois court:

> "Wherein the criminal trial of a person compos mentis but almost totally deaf, the state court has jurisdiction of the subject matter and of the person, and also to direct and enforce the judgment which was entered, the jurisdiction is not lost by any irregularities caused by failure of the court to have the testimony repeated to the accused through an ear trumpet, nor is the accused thereby deprived of his liberty without due process of law in violation of the Fourteenth Amendment. Even though the case be a hard one, Federal Courts cannot on Habeas Corpus proceedings grant relief from the judgment; their power is limited to the question of jurisdiction. The writ of Habeas Corpus cannot perform the functions of a writ of error."

In **Sorti v. Massachusetts**, 183 U. S. 138 the question raised by appellant on habeas corpus from the judgment of the state court, in an appeal from a death penalty conviction of murder, was that a convicted party, under a state statute, had a year in which to file a motion for a new trial, and therefore the sentence should not be executed against him. In this case, in the opinion of the court, by Mr. Justice

Brewer, on page 141, it was held:

> "Appeals for the writ have been made and appeals taken from refusals to grant it, quite destitute of meritorious grounds and operating only to delay the administration of justice. It is an attempt to substitute a writ of habeas corpus for a writ of error and to review the proceedings in a criminal case in the state court by collateral attack rather than by direct proceedings in error—something this court has repeatedly said ought seldom to be done."

CONCLUSION

In view of the fact that petitioner's claim of coercion in his confession rests upon his uncorroberated testimony alone, in view of the fact that he has already raised the same issues in a former writ of habeas corpus, filed in the City Court of Reidsville, Georgia, and that the issues there raised have been adjudicated against him by the highest court of the land, the respondent respectfully submits that the findings of fact and the conclusions of law discharging the writ of habeas corpus are correct and is the only proper decision according to the record that could be made by the court below. Wherefore, it is

urged that the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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